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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 684.

COPPERWELD STEEL COMPANY,

Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,

Appellee.

REPLY BRIEF OF APPELLANT.

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It is true that Appellant did not in the petition and amended petition *specifically* bring into question the validity of the Workmen's Compensation Act on the ground of its repugnancy to the Constitution since the Act had not at that time been construed so as to invade the Appellant's constitutional rights; but that claim was necessarily implied in the broader allegations of the petition and amended petition that the orders of the commission unless vacated, prohibited or enjoined will deprive the plaintiff of its property without due processs of law and will deny it the equal protection of the laws.

The question whether G. C. § 871-38 is applicable to permit review of orders awarding workmen's compensation had never before arisen in a case where there was no other available remedy; and, if that section had been construed as it reads, there would of course have been no infringement of Appellant's constitutional rights. The opinions in previous cases involving other than employes of contributing employers, had consistently disclaimed any right to deprive employers of a judicial hearing in court on the legality of an award.

We agree that the state court's construction of G. C. § 871-38 must be accepted by this Court. That section is the only provision outside the Workmen's Compensation Act for review of orders of the Industrial Commission. Likewise for the purpose of this case the state court's construction of the Workmen's Compensation Act must be accepted, as denying to a contributing employer any judicial hearing upon, review of, or other remedy against, orders of the Industrial Commission awarding compensation to its employes, irrespective of the extent of the deprivation of its property resulting from assessment of increased premiums, and in spite of the state court's construction of the same act as affording a remedy to self-insuring employers and non-complying employers against whom illegal awards are made.

We agree (Appellee's Brief, p. 6) that *appeals, rehearings* or *judicial reviews* are not essential to due process of law. However we must likewise accept the repeated decisions in Ohio that the enabling provision of the state constitution does not authorize the legislature to accord finality to orders of the Industrial Commission except upon the question of fact, whether an injury, disease or death resulted from a failure of compliance with a specific safety requirement; and that an opportunity for *judicial hearing* upon legal questions must be afforded or the employer would be deprived of property without due process; and, since G. C. § 1465-90 gives a right of appeal to employes and it has been repeatedly held that self-insuring employers and non-complying employers are entitled to defend against an unlawful or unreasonable award on any legal ground, the denial of the equal protection of the laws to appellant is quite apparent (Brief of Appellant, pp. 8, 16-20, 22-24, 31-33). It is not necessary to extend to great length the argument on this point since it constitutes the clearest infringement of Appellant's constitutional rights. The erroneous suggestion (Appellee's Brief, p. 23) that we

do not press this point calls our attention to an error in printing on p. 42 of Appellant's brief matter which belongs in sub-division 5 of the argument. All of p. 42 should be read as preceding Caption 6 on p. 40.

Contrary to Appellee's brief (p. 10) there is no reference by the Supreme Court of Ohio in either opinion to an examination of the Ohio Constitution Article IV, § 2.

The decision below did not go off on a question of want of jurisdiction nor did the state court dismiss appellant's petition, contrary to Appellee's brief (p. 11). The motion to the petition was treated as a general demurrer (R. 13) not as a demurrer for want of jurisdiction, and was sustained for insufficiency of allegations to show a cause of action (R. 12, 45). Likewise the demurrer to the petition and amendment (R. 23) was not based upon any question of jurisdiction nor did the decision go off on such a question. The petition was not dismissed but was considered at length and the demurrer sustained (R. 23, 45, 46).

The assumption in Appellee's brief (pp. 11-12) that a remedy exists but that Appellant merely failed to avail itself of such remedy or chose an improper mode in pursuing the same is without foundation. We quote from the opinion (R. 17):

> "Since the allegations of the petition do not show a right to a review under § 871.38, General Code, or a right to a writ as prayed for *or other relief*, the petition is subject to a general demurrer."

The only remedy suggested by Appellee or by the Court in the final opinion below (R. 28) is that Appellant could refuse to pay the premiums, assessed after the unlawful allowance of the non-compensable claims, in the computation of which the void awards have been included. This was fully answered in the dissenting opinion below and in the Brief of Appellant, pp. 36-38.

Answering the inquiry on p. 13 of Appellee's brief, the state courts of Ohio have not previously held, and we can-

not refer the Court to any holding of the state courts of Ohio, other than the decision of the Supreme Court of Ohio in the case at bar, that the Workmen's Compensation Act should be construed so as to deny Appellant access to the courts for determining the legality of the orders of the Commission. All prior decisions have sustained the employer's access to the courts for judicial determination of legal questions, and have recognized that denial thereof would be unconstitutional.

In answer to the argument (Appellee's brief pp. 14-16) and the quotation from the opinion below to the effect that Appellant has no interest in the state insurance fund and therefore cannot be deprived of property without due process of law by being required to make excessive contributions thereto we respectfully point out that this Court is bound by the state court's holding in *Voeller v. Warehouse Company*, 136 O. S. 427 (cited in Appellant's brief p. 43) that a legal interest is not essential to the denial of due process or of the equal protection of the laws where the operative effect of a statute, the orders of the Commission, or the decision of the court is to deprive Appellant of property without due process of law. The case cited involved a section of the Ohio Corporation Act regulating the procedure for determination and payment of the value of stock of dissenting shareholders; and the court there held the provision that the value demanded by dissenting shareholders should become conclusive and binding in the absence of certain proceedings was unconstitutional by reason of its effect upon non-dissenting shareholders of the corporation not parties to the procedure.

Contrary to the suggestion of Appellee's brief (pp. 16-17), the Workmen's Compensation Act was adopted to provide benefits regardless of legal fault for employes injured and killed in the course of employment from hazards created or increased thereby, not for employes injured elsewhere or from other causes; and raising the question of the jurisdiction of the Commission does not involve the

workmen in protracted or expensive litigation. It is important that the Workmen's Compensation Act be administered within the limits of its provisions and in such way that the system will not break down but may continue to function with the continued support of the employes. The employe is not subject to litigation at all, any more than are the employes of a self-insuring employer or non-complying employer, both of which may freely show the illegality of awards. We quote from *Industrial Commission v. Drake*, 103 O. S. 628, 635, cited by the Appellee (p. 17):

> "* * * it is equally important that no claimant should be awarded a sum in excess of that to which he is fairly entitled. The state insurance fund is in the nature of a trust fund to be administered for the benefit of workmen who suffer injury, and for the dependents of those who suffer death, in the course of employment. * * * While the fund is created by premiums paid by employers, it must not be assumed that such fund can be made to meet the payment of unjust claims without an injustice being done to just claimants as well as to all workmen who may never make claims. While the premium is paid by employers, in the last analysis it amounts to a deduction from the wages due the workmen to create a fund to be administered for their benefit. * * * Any unjustified generosity in favor of one claimant must operate as an injustice to all other claimants, because the fund is to that extent improperly depleted."

Appellee's brief p. 17 suggests that it is improper and not at all necessary for an employer to attack an employe's rights to an award in order to protect his prospective financial interest in the state insurance fund. How then can it be protected? In *State ex rel. Powhatan Mining Company v. Industrial Commission*, 125 O. S. 272, it has been held that one may not attack the merit rating system and for the same reason an employer would have no standing to attack the method of fixing basic premium rates, both

of which include as factors the awards during the preceding five years.

The argument of Appellee's brief (pp. 17-22) is not material here since the demurrer admits the truth of the allegations that the injuries and deaths did not arise in the course of or out of the employment; and by sustaining the demurrer the court below declined to consider that question upon the evidence submitted to the Commission. The issue here is whether consideration of that question could constitutionally be refused.

Respectfully submitted,

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